No. 233.

SUPREME COURT OF THE UNITED STATES.

JAMES C. VOORHEES, assignee in bankruptcy of JOHN N. BONESTEEL,

Appellant.

against

JOHN N. BONESTEEL AND SOPHIA H. BONESTEEL.

BRIEF AND POINTS OF APPELLANT.

J. P. C. COTTRILL,
For Appellant.

Milwaukee News Company, Book and Job Printers.

Supreme Court of the United States.

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Appellant.

against

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BRIEF AND POINTS OF APPELLANT.

This is an appeal from a final decree dismissing a bill in equity filed by the appellant as complainant in the Circuit Court of the United States, for the Eastern District of New York. The bill alleges due proceedings in bankrupty on the voluntary petition to be declared a bankrupt by said John N. Bonesteel; the appointment of the appellant as assignee, his acceptance thereof, and that he is acting as such; that debts have been duly proved exceeding ten thousand dollars; that the bankrupt's schedule include debts to the amount of more than $30 000; that they include no assets but a worthless note; that no assets have come to the appellant's hands as assignee, and he believes that nothing can be realized from the assets scheduled; that all the debts proved, and scheduled, except one of $125, were contracted prior to the year 1866, and that the bankrupt has been in fact insolvent and bankrupt since

the year 1859. (Record folios 3-6.) All these allegations are stipulated to be true in the written stipulation read in evidence by the appellant on the final hearing; see Record folios 113-115.

The bill further alleges that that the defendant, Sophia H. Bonesteel, is the bankrupt's wife: that she is owner of 1145 shares of stock of the Nicolson Pavement Company, of Brooklyn, New York, a corporation of that state, of the par value of $114,500, and that its value is upwards of $30.000. (Record folio 6.) The answers of both defendants deny that the stock is worth thirty thousand dollars, and "aver that it is worth less than one third of such sum." (Record folios 36 and 56); and in the answer of Mrs. Bonesteel, (Record folio 45,) in answer to the 5th interrogatory of the bill, she states that "she does not know the value of such shares, but believes it to be less than $10.000."

The bill further charges that this stock is in fact the property of the bankrupt, and should be delivered to the assignee to be applied to the payment of the bankrupt's debts.

It proceeds then to set out the manner in which the Company was formd and the stock acquired, viz: that in 1866, Samuel Nicolson, was the patentee of a patent for wooden pavements, and had assigned the license for laying it in Brooklyn to Jonathan Taylor; Taylor, as claimed and charged, employed the bankrupt to sell this license; he did sell one half to the firm of Wm. Smith & Co., for $10.000, paid; and Taylor assigned the license, one-half to certain parties; (shown in the proofs to be Page, Kidder & Co. Folio 100;) and one half to Mrs. Bonesteel, *in the same instrument*; the bill charges that the one-half interest so vested in the bankrupt's wife was conveyed to her in consideration of his services in negotiating and selling the other half for $10.000; these parties owning the one half, Smith & Co. and Mrs. Bonesteel then organized the Nicolson Pavement Co. of Brooklyn, under the general laws of NewYork,

one-fourth interest in the license having in the meantime been conveyed to Smith & Co. for $10.000; the license was transferred to the corporation and its stock issued to the parties owning the license therefor, Mrs. Bonesteel receiving for her one-fourth interest 1150 shares, being one-fourth of the whole, which was $500,000 in amount, or 5000 shares less $40.000 of par value reserved for working capital; that 44 other shares, out of the working capital were afterwards issued to Mrs. Bonesteel, and by her sold to Page, Kidder & Co. for $3000 cash, and that she afterwards transferred five shares of 1150. originally issued to her, to her husband, which five shares still stand in his name. (Record folios 7, 8, 9, 10.)

The bill further charges (folio 10) that since the organization of the company the bankrupt has participated in its management, and had no other business; that the company has had many and profitable contracts from the city of Brooklyn to lay pavement therein under the patent and license, and made large profits upon which this stock is entitled to dividends; that none of the stock, profits or dividends, or the $10,000 received from Smith & Co. on the sale of the one-fourth interest to them, or the $3,000 received from Page, Kidder & Co. on the sale of the 44 shares to them, were included in the bankrupt's schedule or have been delivered to the assignee; and the bill prays that the money so received, stocks, profits, &c, be paid and transferred to the complainant, the assignee.

The answers of the defendants admits in substance the formation of the company, and the other facts stated as to the issues and amount of stock, the sale of the one-fourth interest to Smith & Co. for $10,000, the sale of the 44 shares to Page, Kidder & Co., (but allegcs that the price paid by them was but $2,000,) and the transfer of the five shares to the bankrupt; (folios 42, 44, 62, 63) they neither admit or deny that the company has had profitable contracts; (folios 44, 63;) the stock is claimed as the separate property of the wife, upon the ground

hat the bankrupt, being engaged in business upon the capital of the wife furnished by her father, he abandoned it to further the interests of Taylor in respect to the patent for the pavement, and that for this and the influence of her friends in respect thereto, the original one-half interest in the license was conveyed to her by Taylor.

The case is one purely of facts upon the evidence.

The claim of the assignee is that the half interest in the license was transferred to the wife of the bankrupt, at a time when he was insolvent and bankrupt, and in consideration only of services rendered by the bankrupt to Taylor, and that therefore the avails belong to the bankrupt's creditors, and that the ownership vested in the wife is simply a cover and a fraud.

I.

The bill seeks discovery as well as relief, and to that end contains special interrogations to each defendant. These interrogations are answered evasively and unsatisfactorily; and many of them are not answered at all. But the complainant to avoid delay filed replications and proceeded to a trial; the fact is alluded to here in the view that it should be borne in mind in determining the weight to be given to the answers; and is now passed with the further remark that the evasiveness, uncertainty and nnsatisfactory manner in which the defendants answer when their consciences are searched, is the usual concomitant of answers to bills filed to set aside transfers and covers made for the purpose of defrauding creditors.

II.

A proceeding to reach this stock, or petition of the asignee filed in the Circuit Court of the United States for the Southern District

of New York, where the bankruptcy proceedings were pending, resulted in their dismissal by Mr. Justice Nelson, on the ground that the most proper way to proceed was by bill filed instead of by petition. Justice Blatchford in the District Court having ordered the stock to be delivered to the assignee on a full hearing no the merits, and the matter having been removed into the Circuit Court on a petition for review. Most of the testimony taken in that proceeding was read by consent in this case. The petition and answer in that proceeding were introduced in evidence on the final hearing below. (Record folio 75.) The petition does not appear in the record; but it will be conceded that it contained substaniallythe allegations of the bill in this case; this answer to that petition is contained in the record at folio 27—31; and the record, as returned from the court below and printed, seems strangely jumbled; but the evidence is all returned except the account book of the bankrupt referred to in his testimony at folio 77.

III.

The claim made by the answer is that Taylor being desirous of promoting the interest of this pavement in Brooklyn, sought the services of the bankrupt's wife, and the influence of her friends in behalf of the pavement, and for this and (also impliedly) for her abandonment of a business then carried on by the bankrupt and with her means, the interest was conveyed to her. The answer does not allege that the abandonment of the business formed any part of the agreement with Taylor, but it alleges that such abandonment took place.

It does not appear that Taylor had any interest whatever in the pavement beyond the license for Brooklyn. The answer alleges that it was the influence of defendant's friends in favor of the pavement IN BROOKLYN that Taylor sought, and for that he transferred the half interest. The falsity and even absurdity

of this claim becomes at once apparent when it is considered that Taylor in the same instrument that conveyed the one-half to the bankrupt's wife conveyed the other half to Smith & Co., thus disposing of her entire interest in the pavement, so that this claimed influence became then of no possible consequence to him. The answer besides does not disclose why Taylor desired this influence (nor does he state in his evidence) or how it could or did benefit him. When he made the transfer it was of the whole, and having received $10,000 for the one half sold by the bankrupt, and parted with his whole interest it became wholly immaterial whether a single yard of the pavement was ever laid in Brooklyn or not, in either case he could neither be benefitted or damaged to the extent of a farthing. On the answer alone the complainant was entitled to a decree.

IV.

The claim that the business of the bankrupt's wife was abandoned at a sacrifice is not supported by the evidence. The transfer to Mrs. B. was not made till December 7, 1866. The bankrupt testifies (folio 78,) that the business was unprofitable, and was done at a loss ; his book annexed to his testimony as exhibit B (headed J. N. Bonesteel, Sales Book, but not returned with the record) shows as he testifies all the business that he did from Decemher 20, 1865, to Aug. 15, 1866.

It shows 7 sales in December.

3	"	"	January.	
9	"	"	February	
3	"	"	March.	
3	"	"	April, amount	$252.00
3	"	"	May, "	36.88
1	"	"	June, "	367.85
0	"	"	July.	
1	"	"	August, "	460.60

Profits in December were $134,35. There were no more profits; and the losses in March were $810 67. From April to August, 5 months, the amount of sales in all were $1117.33 and the transfer was not made till December following. He had no store, but was given desk room, he left his goods at the places where they were bought until he sold them again. He bought some of the time at least in his own name. He kept his bank accounts part of the time at least in his own name. The book which was in evidence is "J. N. Bonesteel Sales Book," yet Mrs. B. in her answer (folio 38) says that she and her children were supported by means furnished by her father and by profits of such dry goods commission business.

The claim then, that she made a sacrifice of this business is disproved by the bankrupt's evidence.

V.

The claim however as to the business is in the complainant's favor. If the interest was received on any consideration growing out of that, it must have been for the bankrupt's time. Giving up the business by the withdrawal of the bankrupt's time and personal services from it and the devotion of them in any way to Taylor, makes anything received for it the property of the bankrupt's creditors. The wife has no mortgage upon the husband's time and services, he may act as her agent in respect to her separate estate. But if he renders his time and services to any one else the avails must go to his creditors.

We propose to examine the answer in connection with her answer in the former proceeding, her examination in the bankruptcy proceeding, and her husband's testimony. We quote from her former answer. "And further answering the said petition, she says: that at and previous to the time of said John N. Bonesteel entering into the service of the said Jonathan Taylor, he was and had been carrying on the dry goods com-

mission business in the city of New York, as the agent and attorney in fact of the said Sophia H. Bonesteel, and in her name and solely upon capital furnished by her, being money obtained by her from her father, one Sherman Hartwell, of Bridgeport, Connecticut, and that the family of said bankrupt, including this respondent and her children, had long been and then were living in a dwelling house owned and furnished by the said Hartwell, and supported wholly by means derived from said Hartwell by this respondent, *and by the profits of the said business* so carried on as aforesaid by the said bankrupt upon capital owned or procured by her. That the money so advanced by said Hartwell, and the purchase of said house and furniture, and the use of the same for said bankrupt's family were procured by this respondent, and if the sums so advanced should not be re-paid to said Hartwell during his life time, the same were to be chargeable to her share in her said father's estate, which is greatly more than the amount of such advances." Thus far, the answer in the present case is identical in substance, and nearly so in words with the answer in the first proceeding—but now comes a divergence, as will appear by a comparison.

ORIGINAL ANSWER.

"That while so engaged in business as aforesaid as the agent of said Sophia H. Bonesteel, the SERVICES *of said bankrupt were sought by said Taylor, in the interest of the said Nicolson pavement, in the cities of Brooklyn, New York, and Jersey City, on account of the friendship existing* BETWEEN THEM AND ON ACCOUNT OF THE BUSINESS CAPACITY AND ACQUAINTANCE OF SAID JOHN N. BONESTEEL, and on account more especially of the influence wealth and position of certain parties connected by marriage

ANSWER IN PRESENT CASE.

That while *this defendant* was so engaged in such dry goods commission business, and was so employing such bankrupt therein, upon capital so furnished by her said father as aforesaid, *the services, aid and influence of this defendant and through her the aid and influence of her friends, were sought by said Taylor*, in the interest of said Nicolson pavement in the *City of Brooklyn*. That *said Taylor and* THIS DEFENDANT *were old friends of many years*, and this defendant had at that time influential and

with the said Sophia H. Bonesteel.

That said bankrupt was not then engaged in any other business than as aforesaid; that with the knowledge and consent of this respondent, and the assurance from said Taylor, that she should not be allowed to suffer any loss thereby, the said business was given up at a great sacrifice, and *it was agreed that said John N. Bonesteel should devote his time to the pavement interest for said Taylor's benefit, and that in consideration thereof, and as compensation to this respondent for his services and time to which she was justly entitled, and for the sacrifice by her by the abandonment of said business, and not otherwise, it was agreed* that an interest in the patent or right, or license to lay pavement in the city of Brooklyn, should be conveyed to her, said Sophia H. Bonesteel, * * * * * that all the consideration for such interest moved from this respondent *by reason of the facts aforesaid* * * * * * alleges that such transfer was made to her by said Taylor, *in accordance with the arrangement hereinbefore set forth and not otherwise.*

wealthy friends of good position, who could aid in introducing such pavement in Brooklyn, of which fact said Taylor was then well aware. That said Taylor *greatly desired the aid of this defendant* and of her said friends and especially of one of them, to wit: Hon. S. B. Chittenden, defendant's brother-in-law, who was in a position to be of great service in the matter as said Taylor well knew; *and agreed with this defendant that if she would procure such influence and aid,* he would give her a one half interest in the license and right he then had to lay such pavement in said City of Brooklyn, *and would give her said husband, to wit, said bankrupt, employment* in promoting said pavement interest in the cities of New York, Brooklyn, and elsewhere, which he said Taylor claimed, and said would bring to this defendant a much better and larger income and support to her family, than she was then receiving in said dry goods business * That this defendant accepted said proposition of said Taylor and did thereupon aid him, by her personal exertions and services, in all proper ways within her power in promoting such pavement interest in the City of Brooklyn, and did induce her said influential and wealthy friends to aid her in various ways in so promoting and introducing such pavement in said city of Brook-

lyn, and did consent to abandon, and did abandon said dry goods commission business, and devote her time and attention and procure that of her friends and their influence as aforesaid, to aid her in promoting and introducing the pavement as aforesaid.

That thereupon and upon the acceptance of such proposition and in consideration thereof, said Taylor did, on or about the day of convey such one-half interest to this defendant, and that without such acceptance of such proposition, and the belief on saib Taylor's part, that this defendant could be of very great service in promoting such pavement interest as aforesaid, he the said Taylor would not have so conveyed such one-half interest to her as aforesaid. That said defendant fully kept her part of such agreement in all respects and secured the active aid of her said brother-in-law, the Hon. S. B. Chittenden, who was the first to introduce such pavement in Brooklyn, by procuring a sample of the same to be laid in front of his own residence, in Pierpont street Brooklyn, at his great expense: all of which aid and service was rendred as aforesaid to the satisfaction of said Taylor.

This is the whole of both answers, as to the contract with Taylor for the license.

In the first "*the services of the* BANKRUPT were sought" by Taylor; in the present, "the services, aid and influence of the *defendant* and through her the aid and influence of her friends were sought" by Taylor.

The bankrupt's services were sought in the first in the interest of the pavement in Brooklyn, New York and Jersey City; in the present the services, influence and aid of the bankrupt's wife were sought in the interest of the pavement in Brooklyn alone.

In the first the bankrupt's services were sought on account of Taylor,s friendship *for him*; in the present her services were

sought on account of his friendship *for her*—they were "old friends of many years."

In the first it was agreed that the bankrupt should devote his time for Taylor's benefit and that in *consideration thereof*, the interest should be conveyed; in the present it was agreed that if she would give the desired aid, he would give her the half interest and give her husband employment which would bring her a larger income and better support than she was then getting from the dry goods business.

In the first the conveyance was "as compensation for his services and time, &c.," and not otherwise, and "in accordance with the arrangement hereinbefore set forth and not otherwise;" in the present it was for her time and services and the influence of her friends, and that without it Taylor would not have conveyed at all.

Yet both answers are under oath. We submit that the facts must be taken as being more truly set forth in the first answer than in the second; and that the examination, of Mrs. B., hereafter referred to, more nearly sets them forth than either.

VII.

Mrs. Bonesteel's examination as a witness in the prior case.

Question. State how that transfer came to be made to you?

Answer. Because my husband had money to try and support the family. Mr. Taylor wanted him to devote his time in advancing the pavement, and I was not willing under the advice of my friends that HE *should give up his time* unless HE was remunerated in some way.

Question. Was the interest transferred to you then in consideration of the time that he had given to Mr. Taylor?

Answer. Yes.

Question. Have you stated Mrs. B. all the circumstances under which the interest for Brooklyn was transferred to you?

Answer. I think so ; I have answered all your questions.

Not a word occurs in the entire testimony as to the influence of her friends.

This date is December 7, 1866.

Bonesteel's evidence, question No. 14, folio 118.

Question. What consideration did she give, if any, for the assignment of the one-half interest to her of the right to lay the Nicolson pavement in Brooklyn?

Answer. Consideration expressed in the conveyance of one dollar and the friendly relations that had existed between her and Mr. Taylor for many years. See also questions 37 and 38 and answers thereto.

Question 117 and answer.
" 139 " "
" 149 " "
" 210 to 221 inclusive and answers.
" 15 et leg in 2nd examination.
" 61 " " " " " " as to Book.

See also her answer to the 8th interrogatory in the bill, in which she says that the consideration of the conveyance to her was not the bankrupt's service and that he rendered no personal services therefore.

See Bonesteel's answer to question 149.

VIII.

The answer in fact admits that the transfer was partly in consideration of the bankrupt's services. It says that "at and previous to the time the bankrupt entered into Taylor's service &c.," and that he agreed to give her husband employment which would bring her a larger income and better support to the family ; if his services then contributed to the consideration, the whole is liable to his creditors. Sherman vs. Elder, 24 N. Y. 381 lays down the rule that if the wife allows her separate

estate to be commingled with her husband's the whole is liable to his creditors.

See also in re Bonesteel (as to this very property 2d Bank Reg'r, January 15, 1869, p. 106.) We claimed (quoting the Register's certificate) "to go into the matter for the purpose of satisfying the court that the consideration for the interest flowed in part or wholly from the bankrupt, and therefore that the assignee is to this extent at least entitled thereto."

The Register decided "entertaining no doubt whatever that it was the right of the creditor fully to sift the transaction, and to show, if he should be able to show, that the transfer to the wife was a mere cover, or if not wholly that, then that the consideration for the same flowed in whole or in part from the bankrupt, thus establishing an equitable interest therein in the assignee. I directed the examination to continue and the bankrupt to answer such questions concerning the same as might be pertinent to the end aforesaid."

The court held "the Register was correct in his direction and the bankrupt must answer the questions referred to" it was under this decision that the examination of the bankrupt was taken and read in evidence on this hearing. The decision is full authority here for the complainant.

IX.

It is clear that for the bankrupt's services alone rendered to Taylor, and chiefly for effecting the sale to Page, Kidder, & Co. of one-half for $1,0000 that the conveyance was made. Jenkins' evidence conclusively shows this. By their, and indeed by the bankrupt's testimony it appears (his business having been given up in August—really in May as his book shows) the bankrupt had been superintending laying the pavement for Taylor in New York and rendering him other services from August to December, and he had negotiated this sale to Page, Kidder &

Co. of one-half of Brooklyn. He had been in no other business. Jenkins says that Bonesteel urged him to make Taylor give him one-half for his services, and says his services were "as superintendent in laying pavement in New York, and in introducing it in Brooklyn, and also in procuring Page, Kidder & Co. to buy one-half of Mr. Taylor's interest in Brooklyn."

He told Jenkins he thought Taylor intended to give him one third only. Taylor says that is what he intended to give.

Bonesteel's examination, questions 211 to 220, discloses that Taylor authorized him to sell this half, that he arranged with Taylor to do all in his power to assist in making it; that the inducement for it that Taylor offered him was "*that I should be rewarded in return*;" that Taylor named the nature of the reward, and that it was a gift *to his wife* of an interest in Brooklyn, but did not name the extent of the interest he would give, that the amount was fixed when the other half was sold; that he reported to Taylor that he had made the sale and refused to disclose the names; that the agreement to give the half to the wife was made December 7, 1866, and not before, (which is the date of the transfer; that Mrs B. says in answer to the 8th interrogatory, 6th question, the date of the agreement with her was not the date of the conveyance,) and that he refused to disclose the names till Taylor had agreed to give his wife one-half. Mrs. B. in answer to the 9th interrogatory, question 14, says, that he, *as her agent*, on *consulting* her "refused to disclose the names of the parties he was negotiating with, until said Taylor had *fully agreed with this defendant* to transfer to her the whole of such one-half interest." Bonesteel says he arranged for the half, Taylor says he merely intended to give a third, and doesn't pretend that any fixed amount was ever talked of by him with her, although she says in an answer to the 8th interrogatory in the bill that there was some talk of a conveyance of a third interest and, in reply to the same interrogatory says also that she is of the opinion she was not present

when the conveyance was executed, as her husband testifies she was not.

It is clear that the conveyance to her was a mere cover to keep it from his creditors, and that it was made in consideration of his services only.

X.

Their own witness, Taylor, does not pretend that he ever talked with Mrs. Bonesteel but once, and that was in the latter part of June or first of July, 1866, the transfer was not made till December, even then there was no talk or agreement that any interest should be conveyed to her, she expressed dissatisfaction that Bonesteel was spending his time for Taylor, as Taylor says he had been doing. "Impressed upon her that it was a good thing, provided I could get certain influence to help me along. . . . . I told her I was satisfied that she would make four times as much out of the pavement as Bonesteel would make in trafficking in goods." Here was no contract, and it was the only interview, yet Mrs. Bonesteel swears in her answer to the bill that he refused to name the purchasers to Taylor until SHE HAD FULLY AGREED with Taylor for the one-half.

It is true Taylor says he got these influences. But he is entirely silent as to what they were, or what they accomplished, or whether or how they benefitted him, or not. Having conveyed his whole interest it is difficult to see of what importance they were to him.

On his cross examination he admits that he had known for several years that Bonesteel was insolvent; had talked with him on the subject; he admits that he and Bonesteel talked of the latter's insolvency at the time of the transfer and that his creditors would get what was given him; why he said so he don't

know, and his first answer was that he might have transferred it all to him if he had not been in debt; and he then adds (seeing that this admission was damaging) I may, and may have not, don't know.

XI.

The bankrupt lives in a house furnished by the wife's father and pays no rent, at the rate of five thousand dollars a year. He receives a salary of $4.000, and pays no rent. He has been bankrupt since 1859; has received $10. 000, from Smith & Co., $2.000 from Page, Kidder & Co., and one-fourth of the profits, which last year exceeded $30.000, and is now the president of this company. He does not answer the interrogatories at all annexed to the bill, and she answers very evasively; we did not except to the answers, as we desired a speedy hearing. But the fact that the answers are thus evasive, thus plainly insincere, if not manifestly false and perhaps perjured, entitles these defendants to no sympathy or favor, but furnishes a presumption against them.

XII.

The farthest the courts have gone under the married woman's act is to hold that the wife may appoint the husband her agent in respect to her separate estate and its management.

They do not give her the time, or services, the skill, brains or muscle of her husband.

The act of New York of 1848, only allow her to take property from "any person other than her husband."

The acts of New York of 1860 and 1862, allows her to engage in trade, and protect her earnings. Otherwise they do not change the sources from which she may acquire property, and all these acts have been strictly construed by the court.

Yale vs. Dederer. 18 N. Y., 272.

S. C. 22 N. Y., 450.

Kelso vs. Taber. 52 Barb. 125.

And even in the cases which hold she may make her husband the agent, as Buckley vs. Wells, 53 N. Y., 519, and Knapp vs. Smith, 27 N. Y., 277, the court carefully adverts to the fact that the cases are untainted with fraud, and make that fact, an element in the decision.

XIII

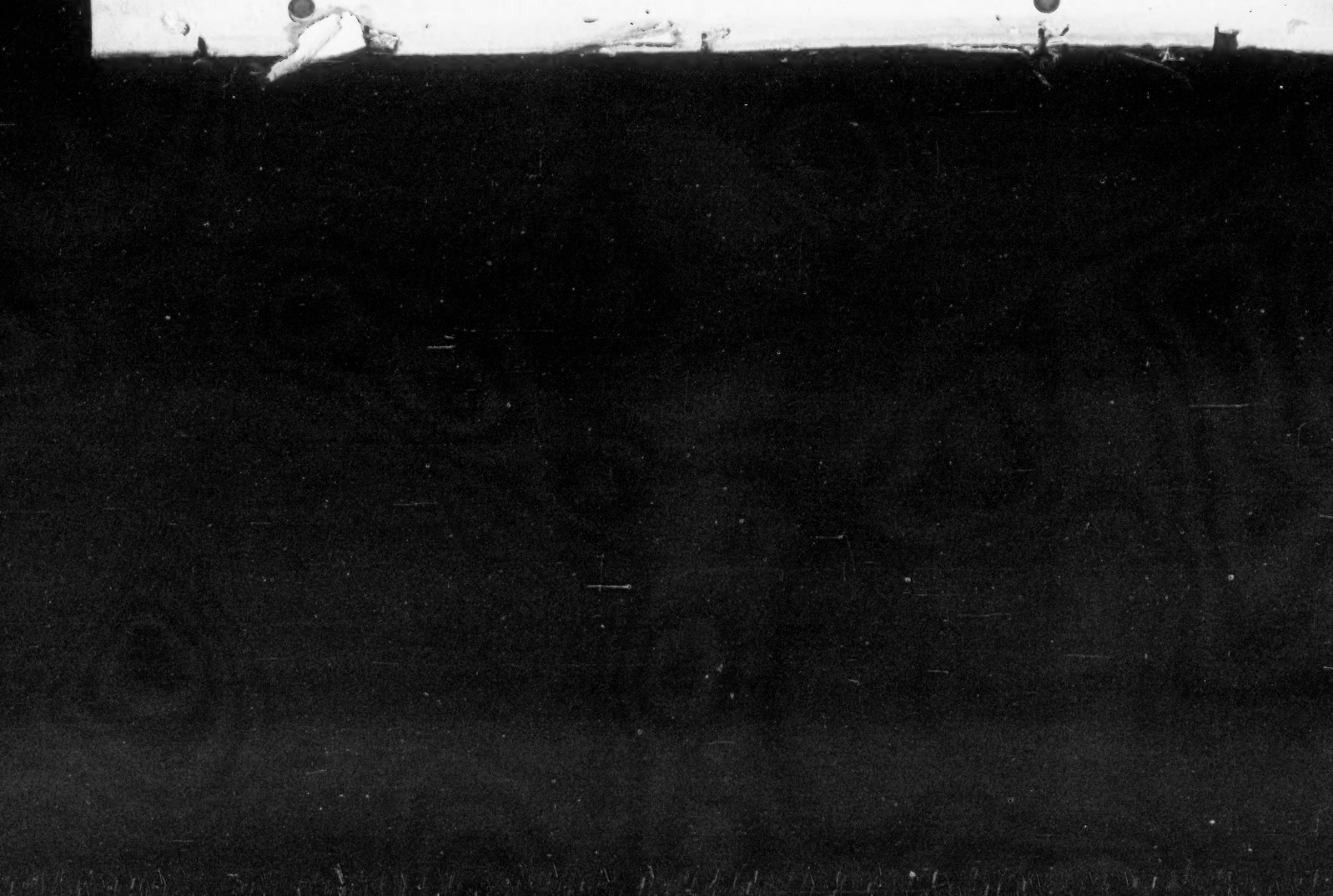
This case is much stronger in its facts than In re R. C. Rathbone 1 Bang Reg. May 11, 1868, p. 145 In re R. C. Rathbone 2 Bang Reg. Dec. 15, 1868, p. 89 which was a case where a similar attempt was made by a bankrupt to conceal in his wife's name his property from the husband.

The property there was procured by the bankrupt's services as an insurance agent and the court said in the first opinion "it must be regarded as a gift by him to her in fraud of his creditors and as property held by her in trust for him."

In the second opinion it is said, and it is entirely applicable to this case. "Fraud is scarcely ever made out by direct evidence. "The proof of it is generally arrived at by the interweaving of circumstances till the fabric is fully formed." It is not often that as full evidence of it is shown as in this case, and yet less full evidence is often entirely satisfactory.

It is confidently submitted that the complainant is entitled to a decree directing the transfer to him of the 1145 shares held by the wife, the 5 shares held by the husband, and also a decree for all the moneys received by reason of this license.

J. P. C. COTTRILL.
for Appellant.



Evening Post Steam Presses, 41 Nassau Street, cor. Liberty, N. Y

Supreme Court

OF THE UNITED STATES.

James C. Voorhies, Assignee of John N. Bonesteel, Bankrupt,
Appellant,

vs.

Sophia H. Bonesteel et al.,
Respondents.

No. 233.

Statement and Brief by Respondents.

Statement.

The qnestion in controvessy is, whether 1145 shares of the stock of the Nicholson Pavement Co. of Brooklyn, belong to the above named respondent, Sophia H. Bonesteel, or should go to the assignee of he husband John N. Bonesteel, a bankrupt.

The complainant's bill alleges that the stock, though standing in the name of the wife, on the books of the company, is in fact the husband's and asks that it may be sold by the assignee for the benefit of the creditors of the bankrupt.

The respondent, in her answer, denies this allegation, and avers that her husband is not the owner, and never was, nor has he any interest whatever, nor has he ever had in the stock in question, but that it is her individual and separate property and estate.

The respondent further avers, that she has advanced large sums of money to meet her share of the expenditures of the company, and to protect and promote her interest therein.

Her answer further shows that said John N. Bonesteel, the husband, was doing a dry goods commission business, as the agent and attorney fn fact of the respondent (the husband then being and for several years prior an insolvent.)

That the money with which to conduct such dry goods business was furnished by the respondent, the same being money obtained by her from her father, Sherman Hartwell, of Bridgeport, Conn., who also owns the house and furniture therein in Brooklyn, occupied by the bankrupt and his family. That Mr. Hartwell has made advances from time to time for such house, &c., and such business, to his daughter, the respondent, to whose share of her father's property such advances are to be charged if not repaid in the father's lifetime.

That while so engaged in such business in the year 1866, one Jonathan Taylor desired and obtained the services of the respondent and her friends, in advancing his, Taylor's interest, in the Nicholson Pavement, particularly in the city of Brooklyn, under the following circumstances. Taylor sought the aid of the respondent on the general grounds of her friendship, and especially for the reason that he desired to secure the respondent's influence, and that of some of her influential friends to aid in introducing the new pavement.

It appears in evidence that the person whose aid Mr. Taylor very much desired was the Hon. S. B. Chittenden, a friend and brother-in law of the respondent Mrs. B.

That said Taylor agreed to give the respondent the one-half Brooklyn interest in the pavement, provided she would consent to abandon her dry goods business, in which the bankrupt was engaged as her agent to enable her husband to give his attention to Taylor's interests, and provided further that the desired influence of herself and friends could be secured to aid in introducing the new pavement. This was done to the satisfaction of both Taylor and the respondent. So much of such one-half interest as is now held by the respondent is represented by such 1,145 shares. That no money was paid for such interest, and that the consideration for the transfer of such one-half interest moved from the respondent by reason of the facts set forth in her answer, and the same was so done in good faith and without any interest or purpose to defraud said bankrupt's creditors.

Statement of the Evidence.

The testimony shows substantially the facts alleged in the answer.

The following persons were examined:

Mr. Bonesteel, the bankrupt.
Mrs. Sophia H. Bonesteel, his wife, and respondent.
Hon. S. B. Chittenden.
Charles E. Jenkins.
Jonathan Taylor, and
Mr. Fletcher, Secretary of the Co.

Of these witnesses Mr. and Mrs. Bonesteel, and Jonathan Taylor, and Mr. Chittenden are the only

persons who had or could have a personal knowledge of the arrangement, under which the interest was given by Taylor to Mrs. Bonesteel. Mr. Chittenden was not a witness in the proceedings on petition decided by Judge Blatchford and reversed by Mr. Justice Nelson.

Without repeating the testimony, it is safe to say that it will be found that these four persons make substantially the same statement and fully justify and sustain the answer.

It appears distinctly:

1st. That no money was paid for the stock or the interest it represents, and that such interest, when so assigned, was of nominal value.

2d. Taylor explains why he gave it to the respondent. It was because he deemed it important to secure her, the respondent's, influence and that of her friend and brother-in-law, Mr. Chittenden, without which he says he would not have given the stock. Taylor was properly the judge of what he wanted. His statement on this point should be accepted as conclusive that when the respondent objected to diverting her husband from the dry goods jobbing business, in which he was endeavoring to make a living for his family, on capital furnished by her through the aid of her father, Sherman Hartwell, of Bridgeport, Mr. Taylor replied that she could make more out of the new pavement, and to prepare the way for that afterwards gave her the one-half interest.

3d. It distinctly appears that the husband was paid a thousand dollars and upwards by Taylor for his labor in other matters, and that he never owned the stock nor any part of it, except five shares transferred to him by his wife long after filing his petition in bankruptcy for the purpose of qualifying him to act as trustee.

4th. It also appears that when Mr. Taylor first ap-

plied to the bankrupt for his aid, he found him an insolvent, engaged in a small jobbing business, carried on as aforesaid with funds furnished by his wife, who got means of her father for that purpose.

5th. That the consideration for the gift or transfer of the one-half interest, which at that time was of little or no value to the respondent, moved from the respondent, with whom the owner of the interest personally conferred and made the arrangement. Mrs. Bonesteel took an active part in the matter, and consulted Mr. Chittenden in reference thereto, and afterwards with the trustees of the company in relation to her stock.

See Mr. Taylor's, Mr. Chittenden's and Mr. Bonesteel's testimony.

We claim that Mr. Chittenden's clear statement of the circumstances under which the interest in question was assigned to Mrs. Bonesteel, is demonstrative and ought to end the controversy.

6th. The witness Taylor states explicitly that he told the bankrupt that he would not give *him* any of the stock; that if he did his creditors would get it, and he, Taylor, had nothing to give his creditors.

This should not be used against the husband's claim. Looked at fairly, it tends to establish the probability that the intent was to make this an interest for the wife exclusively.

7th. On cross-examination, the same witness states that he would not have given this stock to the husband even if he had not been insolvent. He made this remark as to the creditors; he says, because he thought so, and that it was not in reply to any suggestion of the bankrupt's.

Mr. Chittenden's important testimony, which is a new element, in that it was not taken in the first procedure, confirms all that Mrs. Bonesteel and Taylor

say in reference to his action in the premises and the objects he had in view; which were, 1st, to secure a good pavement, and, 2d, to aid Mrs. Bonesteel.

He states explicitly that this was his purpose.

8th, The testimony of Charles C. Jenkins only shows that he took some part in the preliminary talk prior to the transfer of the stock to the respondent.

He did not understand to whom the stock was to be given; at least he did not hear the respondent, Mrs. B., mentioned in that connection, and seems to have been under the impression that the stock was to be given to the bankrupt. But it was not so given; and what Jenkins understood, or did not understand is not important.

He had no interest in the matter, and there was no reason why he should know what the arrangement was. Mr. Fletcher, the Secretary of the Company, testifies as to the organization, &c., of the company and that nothing has ever been paid by the company directly or indirectly to Mr. Bonesteel on account of such 1145 shares held by Mrs. Bonesteel.

POINTS.

First.—Under the laws of New York a married woman may own and possess property as if she were single, and the same shall not be liable for her husband's debts.

Laws of 1848 and 1849.
Laws of 1860, p. 157, ch. 90, § 1.

And may sell her property, and carry on any trade or business, &c.

See do., §§ 2 and 3.

Second.—No decision can be cited, which in principle supports the assertion of the plaintiff, that the stock in question should go to the assignee.

Third.—The law will protect the wife's separate estate. As to that portion of it in controversy, no creditor has ever suffered on account of it. No creditor's property or money is represented in it in any way whatever.

The stock or interest was transferred to the respondent by Mr. Taylor, for reasons satisfactory to both, and that related solely to their mutual interests.

The consideration, therefore, or inducement to make the transfer moved from her the respondent. When the transfer was made it became her property, and there is no possible reason, why it should be confiscated to gratify creditors, who are represented nominally by the assignee, Mr. Voorhies.

Fourth.—A married woman is at liberty to avail herself of the agency of her husband, as if they had not been united in marriage.

Buckly *vs.* Wells, 33 N. Y., 518.
Owen *vs.* Cauly, 36 id. 600.

See also Knapp *vs.* Smith, 27 id., 277, a leading case not only on subject of agency, but of wife's title to property claimed by husband's creditors.

Draper *vs.* Stovenal, 35 id., 513.
Abby *vs.* Deyo, 44 Barb., 382.
Hinckley *vs.* Phelps, 2d Allen, (Mass.), 77.
Richardson *vs.* Merrill, 32 Vt., 27; 33 Vt., 457.

Fifth.—There is no difficulty in holding that at law a married woman may now own property as against her husband.

While her title is open to inspection, creditors can reach it only upon the ground of "fraud." In such inquiry the question is whether the transaction is sincere and *bona fide*.

Gage *vs.* Dauchy 34 N. Y., 296, in which Smith *vs.* Knapp, *supra*, is cited with approbation.

Sixth.—The case of Buckley *vs.* Wells, 33 N. Y., 523, is like the one at bar in this. In that case the husband carried on business, kept store as agent for his wife, using her money. The sheriff levied at the instance of the husband's creditors.

The Court of Appeals say: "There is no law in this State which mortgages to the creditor either the person or the labors of his debtor; no longer a law which consigns the innocent and unfortunate to confinement within prison walls." "In seeking employment, for the purpose of educating and supporting his children, the husband may apply to the wife, if she have a separate estate, as well as to a stranger." She may manage her separate estate herself, or employ others to act for her.

As to that separate estate, she and her husband are as distinct before the law as if the marital relation did not exist.

"As to that property she acts as a *feme sole*, and may deal with her husband, as with a stranger, and may employ him and compensate him for its management."

It is further said, that now that the law is changed, "the wife holds her property as inde-

pendent of the ownership and control of her husband as of a stranger" (page 524).

This case was decided in 1865.

In the case of Knapp *vs.* Smith (decided in 1863), 27th N. Y., 277—Replevin for one colt and seven yearling heifers.

The husband was insolvent, and made an assignment. The wife bought eight cows and one mare of the assignees of her husband. The colt and five of the heifers, for which the suit was brought, were the increase of the mare and cows.

The Referee found "that the husband managed the farm, and worked it, as his wife's agent; that the family of the plaintiff had been supported from the products of the farm."

Judge Denio, in affirming the plaintiff's judgment, says: "That the object of the Acts of 1848-9 was to divest the title of the husband, *jure marite*, during coverture, and to enable the wife to take the absolute title, as though she were unmarried." P. 279.

He further says: "She could cultivate the land and manage the personal property by means of any agency which any owner of property might employ, and that the produce thereof, and the increase of the stock, would be hers."

Seventh.—It is respectfully submitted that, in the case at bar, it clearly appears the stock in question is the property of the wife, that it should not go to the assignee, and that her title is both lawful and meritorious. That the Circuit Judge was correct in finding that there is no allegation of fraud in the bill, nor evidence of it in the testimony.

Eighth.—The complainant's bill, which contains no allegation of fraud whatever, was properly dismissed at Circuit. The reasons for such dismissal are so well set forth by the court below, in the opinion there given, that we respectfully refer this honorable court to the same.

It may be found reported in the 7th of Blatchford's Circuit Court Reports, 495.

Ninth.—The judgment of the Circuit Court was right, and should be affirmed, with costs.

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Counsel.